WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Direct: 202 429 4732
Fax: 202 887 8979
tjones@willkie.com

Thomas Jones

August 27, 2002

EX PARTE

Ms. Marlene H. Dortch
Federal Communications Commission
Room TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 96-98; 02-33; 98-147; 95-20; 98-10; 01-337; 01-321; 00-51; 98-141; 96-149; 00-229; RM 10329; WT 99-217

Dear Ms. Dortch:

On August 27, 2002, a copy of the attached letter from Larissa Herda, Chairman, CEO and President of Time Warner Telecom, was delivered to Chairman Michael Powell.[1] Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), a copy of this letter and the attached letter from Ms. Herda to Chairman Powell is being filed electronically for inclusion in the public record of each of the above-referenced proceedings.

Sincerely,

/s/
Thomas Jones

cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Matthew Brill
Jordan Goldstein
Daniel Gonzalez

---

1 Although the letter from Ms. Herda is dated August 23, 2002, it was not delivered until August 27th.

Christopher Libertelli
Michelle Carey
William Maher
Tamara Preiss

TIME WARNER TELECOM

Larissa Herda
President - CEO

August 23, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
455 Twelfth Street, S.W.
Washington D.C. 20554

Dear Chairman Powell:

I am looking forward to our meeting in early September. During our meeting, I'd like to discuss Time Warner Telecom's business and the manner in which issues currently before the FCC affect that business. Below, I have provided a description of the specific issues I would like to cover.

I continue to believe that well-run facilities-based competitors that focus on business customers can ultimately thrive. Since the passage of the Act, Time Warner Telecom has built an impressive customer portfolio. We provide Internet, voice and data telecommunications service to over 6,800 diverse customers consisting of small, medium and large businesses as well as public schools, government agencies and hospitals across the nation. I firmly believe that the broadband opportunities we provide the business community are providing the foundation and the necessary building blocks that will allow all consumers to realize the benefits of broadband technologies. Notwithstanding these positives, Time Warner Telecom remains vulnerable to several potential developments, all of which pertain to pending FCC proceedings. Some of these issues affect all carriers, but in most cases the risk is disproportionately placed on competitors like Time Warner Telecom. In fact, I have become increasingly concerned about the incumbent LECs' attempts to use the current market conditions facing telecommunications carriers as a pretext, sometimes for establishing new regulations that would give the incumbents an arbitrary competitive advantage over competitors and sometimes for eliminating regulations that are necessary to allow competition to develop in the future.

You have spoken convincingly in the past of the need to unlock the potential of broadband by eliminating unnecessary regulation of ***consumer*** services provided by the incumbents. I fully understand the objective, but caution that deregulation is not the way to unlock the potential of broadband for ***business*** customers. The demand patterns and the costs of supplying service on the business side are fundamentally different from the consumer market. Facilities-based competition can be sustained. Thus, the way to stimulate investment and innovation in broadband services for business customers is to make existing regulations more effective. If Time Warner Telecom is able to obtain the few inputs it needs from the incumbents (such as collocation and high-capacity end user connections) on reasonable terms and conditions, it will continue to invest in the parts of its own network that it can deploy efficiently (such as transport, switching and, wherever

economically justified, high capacity end user connections). Business customers and the economy more broadly will then experience the benefits you have appropriately focused on for consumers.

There are three critical areas that regulation-affecting carriers in the business market must address.

Compensation for services rendered to debtor carriers in bankruptcy. First, it is important to emphasize that the WorldCom bankruptcy has, like other carrier bankruptcies, harmed competitors as much as, or more than, incumbents. WorldCom and its affiliates represented approximately 12 percent of Time Warner Telecom's recurring revenue as of June 30, 2002. While reported RBOC exposure is considerably larger in absolute dollar terms, the RBOCs' exposure is far less significant in proportional terms. For example, WorldCom represents only slightly more than four percent of SBC's and Verizon's total revenues.

Moreover, if not managed carefully, the WorldCom bankruptcy (as well as other potential bankruptcies) could result in further harmful consequences in the future. In numerous recent bankruptcy proceedings, Time Warner Telecom has been required to provide service to the debtor carrier in bankruptcy despite having to take huge write-offs for unpaid pre-petition services and despite carriers, like Winstar and Espire, falling behind in payment for post-petition services. This is simply unsustainable. The FCC must do everything it can to ensure that the service providers that are required to provide service to WorldCom, while the company remains in bankruptcy, must be compensated. This is at least as significant an issue for competitors as for incumbents. If Time Warner Telecom were required to provide service without compensation to WorldCom, it will lose a larger percentage of its overall revenues than would be the case with the incumbents.

I recognize that this issue will ultimately be decided by the bankruptcy judge, but the FCC (as represented by the Department of Justice) can play an important role in ensuring carrier compensation. They should emphasize the importance of this issue to the bankruptcy judge and work to ensure that any discontinuance procedures are commenced at a time when the bankrupt company still has enough money to pay its service providers and during the time given customers to transition to new carriers. For example, if the Commission decides that a carrier in bankruptcy must provide its customers 30 days notice before discontinuing service, the Commission should urge the bankruptcy court to require that the discontinuance process commence at a time when the debtor carrier still has enough money to pay its carrier vendors for the full 45 days.

The incumbents' requests for security deposits, advance payments and other protections from business risk. The FCC must not allow the incumbents to exploit the WorldCom bankruptcy in a manner that gives them the ability to raise their competitors' costs. For example, as you know, many incumbent LECs have recently filed tariff revisions under which carriers that fail a credit worthiness test would be required to make

some form of advance payment or deposit (effectively increasing the price of interstate access service). Even relatively stable competitors like Time Warner Telecom would fail the credit worthiness tests proposed by the incumbents. If adopted, these proposals would result in a distinct competitive advantage for incumbent LECs in the special access market. They would allow the incumbents to use their tariffs as a means of forcing special access customers to conform to a new payment schedule that Time Warner Telecom (which provides competitive special access pursuant to contracts) could not obtain from its special access customers.[1] In other words, the incumbents are seeking relief from regulators that the market would never permit.

The incumbents' tariff filings are part of their broader effort to exploit intercarrier payments in a manner that harms their competitors. On the collection side, some of the incumbents have adopted extremely aggressive tactics for collecting money owed under their federal tariffs and interconnection agreements. They have refused to process new orders, threatened to disconnect services for non-payment of disputed amounts, and proposed the shortening of payment intervals to 21 days. Such intervals are patently unreasonable. The fact is that carrier billing is complicated and fraught with errors. My company receives approximately 1,700 incumbent LEC invoices every month, most of which are for special access and collocation. A typical RBOC special access invoice is approximately 500 pages long. As a result, the standard industry practice has been payment in a 45-60 day timeframe. It is critical that carriers take this time to review the bills they receive.

Since 2001, Time Warner Telecom has identified chronic billing errors and successfully disputed $13 million in incumbent LEC bills. The LECs say nothing about these significant and persistent billing errors when they ask the FCC to sanction shorter intervals for payment. The net effect is that the LECs will continue to send bills containing significant and costly incorrect charges while they press the Commission to let them insist on less time for review and payment. On this point, you should also know that even after we have successfully disputed incorrect billing, we have to be vigilant in reviewing the next bills because new errors often arbitrarily appear or the credit we expected, fails to appear. Meanwhile, on the payment side, the incumbents have routinely refused to pay disputed amounts they owe Time Warner Telecom for the exchange of traffic (*i.e.*, reciprocal compensation), even where interconnection agreements expressly require them to do so while the dispute is being resolved.

---

[1] Time Warner Telecom often purchases end user special access connections (i.e., channel terminations) from incumbent LECs as an input into Time Warner Telecom's own special access service offering (which would include the incumbent's channel termination combined with transport over the Time Warner Telecom network). The incumbent LECs' tariff filings would, if adopted, force Time Warner Telecom to conform to a more onerous payment schedule when purchasing from the incumbents while it continues to receive payment from its own customers as in the past. The effect would be similar to a price squeeze.

Moreover, the incumbents' trade association (USTA) has proposed regulatory changes that would allow them to recover bankruptcy losses, in part, from their competitors in the provision of long distance, local, and broadband services and by increasing rates for special access services and unbundled network elements. However, only firms with monopoly market power can raise retail rates and rivals' costs to protect against normal business risk. Be assured that a competitive company like TWTC cannot recover bankruptcy losses from its existing customer base. To absorb our own losses plus pay for RBOC losses places all the marketplace risk on competitive companies while alleviating the incumbent from any risk. The Commission must therefore reject USTA's request.

In sum, the incumbents' position appears to be that competitors must pay more and pay more promptly, while the incumbents are not obligated to comply with any payment schedule. The Commission should not allow itself to become an accomplice to this scheme. I urge you to take a more active role in limiting the ILECs' opportunities to exploit intercarrier payments to their advantage.

Continued and more effective regulation to limit the incumbents' abuse of market power. As stated above, it may make sense to reduce the level of regulation applicable to services and facilities, including UNEs, used to provide residential consumer broadband. However, it would be extremely unwise for the Commission to try to artificially jump-start demand among business customers through inappropriate deregulation of facilities used to provide service to those customers. Facilities-based competition in the broadband business market can continue to develop, but that process will stop if the Commission fails to closely regulate incumbent LEC provision of facilities and services over which they have market power. One obvious example of such a network facility is high-capacity end user connections. Neither Time Warner Telecom nor any other competitor can construct its own end user connections everywhere. Not only must the Commission be sure to insist that the incumbents provide those facilities on just, reasonable, and nondiscriminatory terms and conditions, but the Commission should adopt performance measurements and reporting requirements for special access. Such requirements not only make enforcement more likely, but by forcing the incumbents to report on their own performance, will deter unreasonable and discriminatory behavior. Indeed, Time Warner Telecom recently reached an agreement with BellSouth that offers a helpful template for the FCC's special access performance rules.

Similarly, the Commission should take further steps to remove the barriers to a competitor's deployment of facilities. Most importantly, this means that the Commission should eliminate the significant remaining obstacles to obtaining building access. There are still quite a few buildings within our network reach to which we can efficiently construct our own end user connections. However, such construction is simply impossible where reasonable building access is denied. This is an area where regulatory parity between incumbents and competitors would be helpful. In addition, the Commission should do everything possible to reduce entry barriers associated with

onerous and discriminatory state and municipal policies regarding access to public rights-of-way. Again, these rules prevent Time Warner Telecom from uncorking the potential of business broadband by arbitrarily increasing our costs or denying us access.

Finally, the Commission must also avoid taking any action in the context of its broadband initiatives that could be used by the incumbents as a means of escaping regulation of their high-capacity business end user connections. In no event should the provision of these facilities, in any form, be reclassified as a Title I service. The Commission has more than enough power to provide incumbents with the flexibility to compete by scaling back their unbundling obligations and forbearing from unnecessary Title II regulation. As it considers options to stimulate the broadband consumer market, it is critical that the FCC take into account the fundamental differences in the business and consumer markets.

These are just a few of the issues I would like to discuss with you. I look forward to our September meeting.

Sincerely

Larissa Herda
Chairman, CEO and President